

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	NO. 3-07-CR-0258-N
	§	NO. 3-10-CV-1933-N
ERNIE BRADFORD SCROGGINS	§	
	§	
Defendant.	§	

**ORDER ACCEPTING FINDINGS, CONCLUSIONS AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE, AND
DENYING A CERTIFICATE OF APPEALABILITY**

In his Order and Instructions [2], the Magistrate Judge provided that “[p]ursuant to Rule 5(d), Movant may submit a reply brief to respondent’s answer within thirty (30) days from the date of service of the answer.” The government filed its response on November 30, 2010. The Magistrate Judge filed his Findings and Recommendation (F&R”) on December 21, 2010. On January 3, 2011, Movant Scroggins filed his reply [7]; on January 10, 2011, Movant filed his objections to the Magistrate Judge’s F&R [8].

Movant’s first objection is that the Magistrate Judge filed his F&R before Movant timely filed his reply. Movant is correct about the timing; the Magistrate Judge erred in filing his F&R before the time for Movant to reply had expired. However, this Court will consider the substance of Movant’s reply in addressing Movant’s other objections to the F&R. Accordingly, the error by the Magistrate Judge in prematurely issuing his F&R is harmless.

This Court has reviewed *de novo* those portions of the proposed findings, conclusions and recommendation to which objection was made, and reviewed the remaining proposed findings,

conclusions and recommendation for plain error. Finding no error, the Court ACCEPTS the Findings, Conclusions and Recommendation of the United States Magistrate Judge.

Considering the record in this case and pursuant to Federal Rule of Appellate Procedure 22(b), Rule 11(a) of the Rules Governing §§ 2254 and 2255 proceedings, and 28 U.S.C. § 2253(c), the Court DENIES a certificate of appealability. The Court adopts and incorporates by reference the Magistrate Judge's Findings, Conclusions and Recommendation filed in this case in support of its finding that the petitioner has failed to show (1) that reasonable jurists would find this Court's "assessment of the constitutional claims debatable or wrong," or (2) that reasonable jurists would find "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).¹

In the event the petitioner will file a notice of appeal, the court notes that

- () the petitioner will proceed *in forma pauperis* on appeal.
- (X) the petitioner will need to pay the \$455.00 appellate filing fee or submit a motion to proceed *in forma pauperis*.

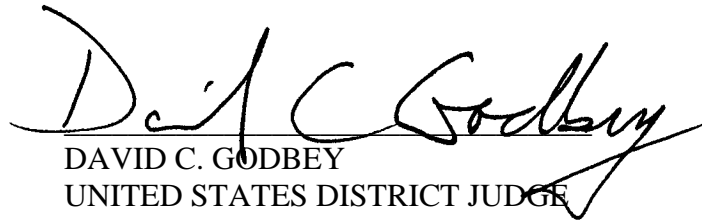
¹ Rule 11 of the Rules Governing §§ 2254 and 2255 Cases, as amended effective on December 1, 2009, reads as follows:

(a) Certificate of Appealability. The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

(b) Time to Appeal. Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

SO ORDERED.

SIGNED March 30, 2011.



DAVID C. GODBEY
UNITED STATES DISTRICT JUDGE